

## THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

NORTHWEST COALITION FOR  
ALTERNATIVES TO PESTICIDES,  
PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS,  
INSTITUTE FOR FISHERIES  
RESOURCES, and DEFENDERS OF  
WILDLIFE,

No. C10-1919Z

## ORDER

## Plaintiffs,

VS.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY.

**Defendant,**

and

DOW AGROSCIENCES LLC, CROPLIFE AMERICA, RISE, OREGONIANS FOR FOOD AND SHELTER, WASHINGTON FRIENDS OF FARMS AND FORESTS, and WILLAPA/GRAY'S HARBOR OYSTER GROWERS COUNSEL.

#### **Intervenor-Defendants.**

1           THIS MATTER comes before the Court on Federal Defendant's ("EPA") Motion  
2 for Extension of Stay, docket no. 66, and Dow Agrosciences and CropLife America  
3 ("Intervenor Defendants") Joint Motion to Stay, docket no. 67. Having reviewed all  
4 papers filed in support of, and in opposition to, the pending motions, the Court enters the  
5 following Order.

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7           **Background**

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9           On July 2, 2002, this Court found the Environmental Protection Agency ("EPA")  
10 in violation of Section 7 of the Endangered Species Act ("ESA") for failure to consult  
11 with National Marine Fisheries Service ("NMFS") to ensure that 54 registered pesticides  
12 would not jeopardize ESA listed salmonid species. Washington Toxics Coalition v. EPA,  
13 No. C10-132C, slip op. at 20 (W.D. Wash. July 2, 2002), aff'd, 413 F.3d 1024 (9th Cir.  
14 2005) (hereinafter "Washington Toxics"). In a separate Order, this Court granted  
15 injunctive relief prohibiting certain uses of those 54 pesticides to protect salmonids while  
16 the consultation process with NMFS proceeded. Washington Toxics, No. C01-132C,  
17 Order at 4-10 (W.D. Wash. Jan. 22, 2004). One of the interim protective measures  
18 ordered by the Court was the implementation of buffer zones of 20 yards for ground  
19 application and 100 yards for aerial application of the listed pesticides, with certain  
20 exceptions. Id. at 4-5.

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23           In 2007, after being sued by the Northwest Coalition for Alternatives to Pesticides  
24 ("NCAP") and others for failure to complete the required consultations, NMFS entered  
25 into a consent decree agreeing to issue biological opinions ("BiOp") on 37 of the  
26

1 pesticides that EPA determined “may affect” listed salmonids. On November 18, 2008,  
2 NMFS issued the first BiOp (“OP BiOp”), concluding that the continued use of the  
3 organophosphate pesticides diazinon, malathion, and chlorpyrifos jeopardized the  
4 existence of 27 species of salmon and steelhead and would destroy or adversely modify  
5 critical habitat for 25 of those species. OP BiOp at 391. On April 20, 2009, NMFS  
6 issued the second biological opinion (“Carbamate BiOp”) concluding that EPA’s  
7 registration of pesticide products containing carbaryl and carbofuran jeopardize 22 listed  
8 Pacific salmonids and would likely destroy or adversely modify the habitat of at least 20  
9 listed Pacific salmonids. Carbamate BiOp at 488. NMFS also found that pesticide  
10 products containing methomyl jeopardize 18 listed Pacific salmonids and likely destroy  
11 or adversely modify the habitat of at least 16 Pacific salmonids. *Id.* The interim  
12 protective measures ordered in 2004, including the buffer restrictions, terminated with  
13 respect to the pesticides at issue in the OP and Carbamate BiOps when NMFS issued  
14 those biological opinions. Washington Toxics, No. C01-132C at 12 (W.D. Wash. Jan.  
15 22, 2004).

16       In April 2009, the pesticide registrants filed suit against NMFS in the U.S. District  
17 Court for the District of Maryland alleging that the OP BiOp was flawed.<sup>1</sup> Dow  
18 AgroSciences LLC v. Nat'l Marine Fisheries Service, 638 F. Supp. 2d 508 (D. Md.  
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21       <sup>1</sup> Defendants’ assert that the outcome of the Maryland case will be dispositive of issues  
22 raised here with respect to both the OP BiOp and the Carbamate BiOP, even though  
23 the Maryland case only challenged the OP BiOp, because EPA raised the same  
24 concerns about NMFS methodologies in their comments to the draft versions of both  
25 BiOPs. See Reply of Invenenor-Defendants in Support of Motion to Stay at 1 (docket  
26 no. 72); Dow Argoscience Motion to Stay at 5 (docket no. 44).

1 2009). The Maryland District Court determined that Federal Insecticide, Fungicide, and  
2 Rodenticide Act's (FIFRA) exclusive jurisdiction provision required plaintiffs to bring  
3 their challenge in the Court of Appeals. *Id.* at 513. The Fourth Circuit reversed and  
4 remanded to the Maryland District Court for further proceedings. Dow AgroSciences  
5 LLC v. National Marine Fisheries Service, 637 F.3d 259 (4th Cir. 2011).

7 On November 29, 2010, alleging that EPA had not taken any steps to implement  
8 the Reasonable and Prudent Alternatives (“RPAs”) and the Reasonable and Prudent  
9 Measures (“RPMs”) articulated in the BiOps, nor taken any alternative protective  
10 measures, Plaintiffs brought this suit seeking to enjoin EPA’s authorization of the uses of  
11 diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and methomyl that do not comply  
12 with the RPAs and RPMs. Complaint for Declaratory and Injunctive Relief at ¶¶ 10, 11  
13 (docket no. 1). On May 25, 2011, the Intervenor Defendants moved to stay this case  
14 pending a decision in the District of Maryland case. Motion to Stay at 1 (docket no. 44).  
15 EPA separately moved to stay this case for six months. Motion to Stay at 1 (docket no.  
16 48). The Court stayed the case until December 30, 2011, and ordered the parties to file a  
17 Joint Status Report (JSR) by that date or within 30 days of a decision in the Maryland  
18 case. Order at 1 (docket no. 58).

21 On October 31, 2011, the District of Maryland issued its opinion concluding that  
22 the OP BiOp was not flawed. Dow AgroSciences, 821 F. Supp. 2d at 810-11. The Court  
23 denied the plaintiffs’ motion for summary judgment and granted NMFS and intervenor  
24 defendants’ cross-motions for summary judgment. *Id.*; Order, No. 09-cv-824 (S.D.  
25

1 Maryland October 31, 2011). The plaintiffs have appealed to the Fourth Circuit. See  
2 Dow AgroSciences LLC v. Nat'l Marine Fisheries Service, No. 11-2337 (4th Cir.).  
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4 The parties submitted a JSR on December 6, 2011, stating that they were unable to  
5 reach a consensus on how this case should proceed following the decision in the District  
6 of Maryland. JSR (docket no. 61). The EPA and the Intervenor Defendants indicated  
7 that they would seek an additional stay. EPA stated that it would seek to extend the stay  
8 because the National Academy of Sciences (“NAS”) is currently conducting a review of  
9 the scientific methodologies underlying pesticide risk assessment, which will inform its  
10 implementation of the BiOps. EPA indicated that it would use an additional stay to  
11 “explore and discuss with the Parties and affected government entities, businesses and the  
12 public, possible approaches for developing alternative, interim, risk reduction measures  
13 that are adequately protective of the listed salmonid.” JSR at 2. The Intervenor  
14 Defendants indicated that they would seek to extend the stay pending the outcome of  
15 their appeal in the Fourth Circuit. JSR at 3. Plaintiffs indicated their opposition to an  
16 additional stay. JSR at 2-3. Following receipt of the JSR, the Court extended the stay to  
17 March 30, 2012, to allow the parties to “attempt to resolve as many issues as possible.”  
18 Minute Order (docket no. 62).

19 EPA has now moved to extend the stay for an additional six months, through  
20 September 28, 2012. Federal Defendant’s Motion for Extension of Stay at 1 (docket  
21 no. 66). Defendant Intervenors have moved to stay pending a decision by the Fourth  
22 Circuit in their appeal of the District of Maryland case, with no date restriction. Dow  
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1 Agrosciences and CropLife America Joint Motion to Stay at 1 (docket no. 67). Plaintiffs  
2 oppose any further stay and, in the alternative, move the Court to issue a preliminary  
3 injunction imposing interim protective measures should another stay be granted.  
4 Plaintiffs' Opposition to Defendant's and Defendant-Intervenors' Motions for Extension  
5 of Stay at 2, 14 (docket no. 70).

7 **Nature of the Case**

8 Plaintiffs have commenced this action to determine whether EPA must, as a matter  
9 of law, implement the OP and Carbamate BiOPs. NCAP argues that extensive evidence,  
10 including the NMFS biological opinions, demonstrates that the current uses of these  
11 pesticides both take individual fish and jeopardize the continued existence of ESA listed  
12 salmonid populations. NCAP seeks to “[e]njoin, vacate, and set aside EPA’s  
13 authorization of any use of diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and  
14 methomyl that does not comply with the RPAs and RPMS.” Amended Complaint for  
15 Declaratory and Injunctive Relief at ¶ 19 (docket no. 40). The Court must decide  
16 whether a continued stay of these proceedings is warranted.

19 **Discussion**

21 **A. Standard for Stay of Proceedings**

22 Federal district courts have the power to stay ongoing proceedings “incidental to  
23 the power inherent in every court to control the disposition of the causes on its docket  
24 with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N.  
25 Am. Co., 299 U.S. 248, 254 (1936). Where there is an independent proceeding related to

1 a matter before the trial court, the Court may “find it is efficient for its own docket and  
2 the fairest course for the parties to enter a stay of an action before it, pending resolution  
3 of independent proceedings which may bear upon the case.” Mediterranean Enters., Inc.  
4 v. Ssanyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983) (quoting Leyva v. Certified  
5 Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979)). “This rule applies whether the  
6 separate proceedings are judicial, administrative, or arbitral in character, and does not  
7 require that the issues in such proceedings are necessarily controlling of the action before  
8 the court.” Leyva v. Certified Grocers of California, LTD., 593 F.2d 857, 863 (9th Cir.  
9 1979).

12 In determining whether a stay is appropriate, the Court is to consider “the possible  
13 damage which may result from the granting of a stay, the hardship or inequity which a  
14 party may suffer in being required to go forward, and the orderly course of justice  
15 measured in terms of the simplifying or complicating of issues, proof, and questions of  
16 law which could be expected to result from a stay.” Landis, 299 U.S. at 254. A district  
17 court’s decision to grant or deny a stay is a matter of discretion. See Dependable  
18 Highway Exp., Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007). The  
19 party seeking a discretionary stay bears the burden of proving that a stay is warranted.  
20 See Clinton v. Jones, 520 U.S. 681, 708 (1997).

23 **B. EPA’s Motion for Extension of Stay**

24 EPA requests that the Court extend the current stay an additional six months to  
25 September 28, 2012, so that it may continue to engage the parties and other interested  
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1 stakeholders in a voluntary process intended to develop acceptable interim measures to  
2 address potential risks from pesticides to listed salmonid. Federal Defendant's Motion  
3 for Extension of Stay at 1. EPA argues (1) a continued stay would conserve the parties'  
4 and the court's resources by narrowing or eliminating issues, (2) plaintiffs will not be  
5 harmed by a continued stay of this case because the case has already been stayed twice  
6 and EPA's proposed plan for developing interim protections will likely result in  
7 protective measures being put in place faster than could be accomplished through  
8 litigation, and (3) EPA will suffer hardship if proceedings continue because it could be  
9 forced to implement the BiOps prior to the issuance of the NAS report and be required to  
10 expend resources on litigation rather than on developing interim protective measures.

11 These arguments are not persuasive.

12 With respect to the first argument, litigation concerning the use of these pesticides  
13 has been ongoing for a decade<sup>2</sup> and this Court already granted EPA one stay to pursue  
14 settlement negotiations. By EPA's own admission, it did not contact any stakeholders  
15 until two months after the court issued the last stay and it did not contact the Plaintiffs  
16 until approximately two weeks before the stay expired. Federal Defendant's Motion for  
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<sup>2</sup> NCAP first sued EPA over the effects of these pesticides in 2002. Washington Toxics,  
23 413 F.3d 1024. There, this Court found EPA in violation of Section 7 of the ESA and  
24 ordered EPA to initiate consultation with NMFS on any pesticide it determined "may  
25 affect" listed salmonid. Id. at 1029. The BiOps at issue in this case are the first of 37  
26 biological opinions that NMFS is required to issue under a 2008 consent decree with  
NCAP resulting from Washington Toxics and additional litigation. NCAP v. NMFS, No.  
C07-1791 (W.D. Wash. July 31, 2008).

1 Extension of Stay at 6; Keigwin Decl. at ¶¶ 7-8 (docket no. 66-1). This does not  
2 demonstrate a strong effort by EPA to reach a settlement with Plaintiffs.  
3

4 In addition, even if EPA diligently continues to pursue an agreed settlement, it  
5 offers no assurance that it will be able to develop interim protective measures that would  
6 be acceptable to the Plaintiffs. Rather, it appears that EPA and Plaintiffs fundamentally  
7 disagree as to what protections are reasonable and necessary.  
8

9 Moreover, it is not difficult to understand Plaintiffs' skepticism about the potential  
10 for developing agreed interim protective measures given the ambiguity used to describe  
11 the proposed process in EPA's briefs.<sup>3</sup> EPA has not demonstrated that granting a third  
12 stay for EPA to continue pursuing the development of interim protective measures would  
13 result in the conservation of judicial resources.  
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15 Second, EPA argues that extending the stay will not prejudice the Plaintiffs'  
16 interests. EPA argues that its proposed process for developing agreed risk reduction  
17 measures will lead to the same type of protective measures that Plaintiffs seek in this  
18 lawsuit. This argument is disingenuous. As noted, EPA and Plaintiffs disagree as to  
19 what remedies the Plaintiffs are seeking and what remedies are available under the law.  
20 EPA vigorously argues that Plaintiffs only available remedy is a lengthy cancellation  
21 proceeding under FIFRA. Federal Defendant's Motion for Extension of the Stay at 10,  
22 12-13; Federal Defendant's Reply in Support of Motion to Extend the Stay at 2-3 (docket  
23

24 <sup>3</sup> See, e.g., "EPA has shown, however, participants in the stakeholder meetings have  
25 **largely voiced support for further exploring the possibility** of implementing effective  
26 interim measures." Federal Defendant's Reply in Support of Motion to Extend the Stay  
at 4 (docket no. 71).

1 no. 71). Plaintiffs, on the other hand, argue that they are not limited to cancellation  
2 proceedings under FIFRA but may also seek an injunction or agreed settlement similar to  
3 the remedy imposed in Washington Toxics. Plaintiffs' Opposition to Defendant's and  
4 Defendant-Intervenors' Motions for Extension of Stay at 6-8 (docket no. 70).<sup>4</sup> Given this  
5 disagreement, it is unlikely that EPA will volunteer to implement protective measures  
6 consistent with what the Plaintiffs believe they can achieve in this lawsuit.

8 Finally, EPA argues that failure to grant the proposed stay will prejudice it for  
9 two reasons. First, EPA claims that proceeding with this litigation may force it to  
10 reconcile a future order from this Court concerning implementation of the BiOps with a  
11 subsequent NAS report evaluating the appropriate approaches and methodologies for  
12 conducting endangered species assessment in the context of pesticide analysis. While  
13 that may be the case, this is not a persuasive reason to support another stay. As  
14 Plaintiffs point out, the EPA will be required to review the impact of the NAS report on  
15 any protective measures that it puts in place regardless of whether they are implemented  
16 as the result of a collaborative process or a court order. Plaintiffs' Opposition to  
17 Defendant's and Defendant-Intervenors' Motions for Extension of Stay at 10 (docket no.  
18 70). The BiOps at issue in this case were issued in 2008 and 2009 respectively. While  
19 the NAS report will speak to the methodology of the science underlying the creation of  
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24 <sup>4</sup> EPA regulates pesticides under FIFRA. 7 USC §§136, et. seq. FIFRA sets forth a  
25 comprehensive regulatory scheme for controlling the sale, use, and labeling of pesticides  
26 and establishes the procedures through which EPA registers, labels, and cancels the  
registration of pesticides. See 7 USC § 136a-d; see also Washington Toxics, 413 F.3d at  
1030.

1 those reports, it will not affect their validity. The District of Maryland has already found  
2 the BiOps to be valid and enforceable. Dow Agrosciences, 821 F. Supp. 2d at 810.  
3

4 Finally, EPA argues that the Court should extend the stay because it would be a  
5 hardship to litigate this case in lieu of continuing the voluntary stakeholder outreach  
6 process that it has already begun. But, as EPA acknowledges, “being required to defend  
7 a suit, without more, does not constitute a ‘clear case of hardship or inequity.’” Lockyer  
8 v. Mirant Corp., 398 F.3d 1098, 1112 (2005). Further, EPA has not made a compelling  
9 argument why proceeding with this litigation will require it to abandon the stakeholder  
10 outreach process in which it has expressed such confidence.  
11

12       **C. Dow Agrosciences and CropLife America’s Joint Motion to Stay**

13       Defendant Intervenors argue that the Court should stay this case until the Fourth  
14 Circuit Court of Appeals issues its decision in their appeal of the Maryland case. They  
15 argue that the Court should extend the stay because (1) there is a “substantial possibility”  
16 that the Fourth Circuit will overturn the Maryland District Court decision, and (2) that  
17 decision could render moot any activity in this case. They argue that a further stay of  
18 these proceedings will conserve judicial resources and will not prejudice the Plaintiffs.  
19 These arguments are equally unpersuasive.  
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22       This Court may stay its proceedings pending the outcome of a related matter if it is  
23 “efficient for its own docket and the fairest course for the parties.” Mediterranean  
24 Enter., Inc. v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983). To the extent that  
25 conservation of judicial resources favors a continued stay, resources will only be  
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1 conserved if the Court of Appeals decides in Defendants' favor. In the event that the  
2 Court of Appeal's decision is adverse to the Defendants, there would be no conservation  
3 of judicial or litigant resources. Instead, this matter will have been unnecessarily delayed  
4 again. Here, Defendant Intervenors' argument that the Fourth Circuit is likely to overturn  
5 the Maryland District Court is conclusory and unsupported by authority.<sup>5</sup>  
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7       Defendant Intervenors argue that the Maryland District Court's decision contains  
8 "several" reversible errors, but only identifies a single error. See Dow AgroSciences  
9 LLC and Croplife America Joint Motion to Stay at 3; Reply of Intervenor-Defendants  
10 Croplife America and Dow Agrosciences in Support of Motion to Stay at 1-2 (docket  
11 no. 72). Defendant Intervenors claim that the Maryland court's decision to allow NMFS  
12 to submit a supplemental declaration with its motion for summary judgment in that action  
13 is reversible error, arguing that the court's reasoning has been rejected by "several"  
14 Courts of Appeal. Dow AgroSciences LLC and Croplife America Joint Motion to Stay at  
15  
16 3. But Defendant Intervenors do not cite to a single opinion that is at odds with the  
17 Maryland District Court's reasoning on this point. Moreover, the District Court's order  
18 appears to be well reasoned and supported. The Maryland Court noted that "[a]lthough  
19 the Fourth Circuit has not addressed this issue, six lower appellate courts have held that  
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23       <sup>5</sup> Under the Administrative Procedure Act, an agency's final action must be upheld unless  
24 it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
25 law." 5 U.S.C. § 706(2)(A). This standard is "highly deferential, presuming the agency  
action to be valid and [requires] affirming the agency action if a reasonable basis exists  
for its decision." Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006).  
Here, the District of Maryland found that the OP BiOp is not arbitrary and capricious.  
Dow AgroSciences, 821 F.Supp.2d at 801 (D. Md. 2011).

1 agencies may submit declarations that ‘illuminate[ ]’ or ‘explain’ the original record, but  
2 not declarations that ‘advance new rationalizations for the agency’s action.’” Dow  
3 AgroSciences, 821 F.Supp.2d at 799 (D. Md. 2011) (citing Yale-New Haven Hosp. v.  
4 Leavitt, 470 F.3d 71, 82 (2nd Cir. 2006) (holding that an agency may supplement the  
5 record on judicial review if the proffered evidence illuminates the original record and  
6 does not advance new rationalizations for the agency’s action); Env'tl. Def. Fund v.  
7 Costle, 657 F.2d 275, 285 (D.C. Cir. 1981) (“The new material should be merely  
8 explanatory of the original record and should contain no new rationalizations.”); Sierra  
9 Club v. Marsh, 976 F.2d, 763, 772-72 (1st Cir. 1992) (same); Sierra Club v. United States  
10 Army Corps of Engr's, 771 F.2d 409, 413 (8th Cir. 1985) (same); Bunker Hill v. EPA,  
11 572 F.2d 1286, 1292 (9th Cir. 1977) (same)). Contrary to Defendant Intervenors’  
12 conclusory allegations, the Maryland District Court decision appears to be thorough and  
13 well reasoned on this point.  
14

15 To the extent that Defendant Intervenors also argues that the Maryland District  
16 Court gave too much deference to NMFS’s conclusions in the BiOps, the Appellate Court  
17 is unlikely to reverse given that it will apply the same deferential standard applicable to  
18 review of an agency action.<sup>6</sup> Defendant Intervenors fail to support their request for  
19 another stay with any reasoned argument or citation.  
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25 <sup>6</sup> This argument is made for the first time in Defendant Intervenors’ reply brief. See  
26 Reply of Intervenor-Defendants Croplife America and Dow Agrosciences in Support of Motion to Stay at 2 (docket no. 72).

1       Defendant Intervenors further argue that staying these proceedings will not result  
2 in harm to the Plaintiffs because, essentially, they have already been waiting for the EPA  
3 to implement the BiOps for a significant period of time. This argument is illogical and  
4 contrary to common sense. NMFS issued the BiOps at issue in 2008 and 2009  
5 respectively. To date, EPA has not put in place any of the RPAs or RPMs contained in  
6 the BiOps or put in place other alternative protective measures. Until EPA takes steps to  
7 implement the BiOPs or put in place other protective measures, the listed salmoids are  
8 being exposed to concentrations of the listed pesticides that NMFS found in the BiOps to  
9 result in jeopardy and adverse modification. Staying this case until the Fourth Circuit  
10 issues an opinion in Defendant Intervenors' appeal could mean a delay of months or  
11 years in Plaintiffs' case.<sup>7</sup> Defendant Intervenors have not demonstrated that this would  
12 be efficient or the fairest course for the parties.

13

14 **Conclusion**

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16       For the foregoing reasons, Federal Defendant's Motion for Extension of Stay,  
17 docket no. 66, is DENIED, and Dow Agroscience and CropLife America Joint Motion to  
18 Stay, docket no. 67, is DENIED. To facilitate entry of an appropriate scheduling order in  
19 this matter, and pursuant to Fed. R. Civ. P. 16 and Local Rule CR 16, counsel are  
20 directed to confer and file a Joint Status Report within thirty (30) days of the entry of this  
21 Order.

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26 <sup>7</sup> See 62 WASH. & LEE L. REV 1733, 1740 (2005) ("Between FY 1995 and FY 1997,  
the [Fourth Circuit's] median time for counseled civil, non-habeas cases terminated after  
hearing or submission was 12.6 months from notice of appeal to final disposition." (citing  
Comm'n on Structural Alternatives for the Fed. Courts of Appeals, 95 tbl.7 (1998)).

The Joint Status Report must contain the following information by corresponding paragraph numbers.

1. A concise statement of the positions of the parties concerning the relief requested in the amended complaint.
  2. A summary of the procedural posture of the case.
  3. A proposed deadline for filing of the administrative record.
  4. A proposed deadline for filing of dispositive motions.
  5. An indication whether any party wishes a scheduling conference before a scheduling order is entered in this case.

If the parties are unable to agree on any part of the Joint Status Report, they may answer in separate paragraphs. No separate reports are to be filed.

IT IS SO ORDERED.

The Clerk is directed to send a copy of this Order to all counsel of record.

DATED this 20th day of June, 2012.

Thomas S Zilly  
THOMAS S. ZILLY  
United States District Judge